

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

JULIE A. LOEWEN,

Plaintiff,

v.

CAROLYN W. COLVIN, Acting
Commissioner of the Social Security
Administration,

Defendant.

CASE NO. 15-cv-05089 JRC

ORDER ON PLAINTIFF'S
COMPLAINT

This Court has jurisdiction pursuant to 28 U.S.C. § 636(c), Fed. R. Civ. P. 73 and Local Magistrate Judge Rule MJR 13 (*see also* Notice of Initial Assignment to a U.S. Magistrate Judge and Consent Form, Dkt. 3; Consent to Proceed Before a United States Magistrate Judge, Dkt. 4). This matter has been fully briefed (*see* Dkt. 10, 16, 17).

After considering and reviewing the record, the Court concludes the determination that plaintiff is not disabled was based on sound legal reasoning and well supported by substantial evidence in the record. The decision is affirmed.

BACKGROUND

Plaintiff, JULIE A. LOEWEN, was born in 1959 and was 49 years old on the alleged date of disability onset of January 1, 2008 (*see* AR. 21, 167-68). Plaintiff graduated from high school and has a 4-year degree in computer and business (AR. 51). Plaintiff has work experience as a substitute paraeducator (AR. 202-13). Plaintiff's last employment was part-time with a school district testing children for reading and reading comprehension (AR. 52). She was unable to complete the training for the new testing and was not called back to work (AR. 52).

According to the ALJ, plaintiff has at least the severe impairments of "bipolar disorder, depression, obesity (20 CFR 404.1520(c))" (AR. 23).

At the time of the hearing, plaintiff was going through a divorce and living alone in the home (AR. 50).

PROCEDURAL HISTORY

Plaintiff's application for disability insurance ("DIB") benefits pursuant to 42 U.S.C. § 423 (Title II) of the Social Security Act were denied initially and following reconsideration (*see* AR. 72-80, 82-95). Plaintiff's requested hearing was held before Administrative Law Judge Cynthia D. Rosa ("the ALJ") on January 11, 2013 (*see* AR. 45-70). On March 1, 2013, the ALJ issued a written decision in which the ALJ concluded that plaintiff was not disabled pursuant to the Social Security Act (*see* AR. 18-44).

In plaintiff's Opening Brief, plaintiff raises the following issues: (1) Whether the ALJ properly evaluated the medical evidence; (2) Whether the ALJ properly evaluated plaintiff's testimony; (3) Whether the ALJ properly evaluated the lay evidence; (4)

1 Whether the ALJ properly assessed plaintiff's residual functional capacity ("RFC"); (5)
2 Whether the ALJ erred by basing her step five finding on a residual functional capacity
3 assessment that did not include all of plaintiff's limitations; and (6) Whether the new
4 evidence that was submitted to the Appeals Council supports remand for a new hearing
5 (*see* Dkt. 10, p. 2).

6 STANDARD OF REVIEW

7 Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's
8 denial of social security benefits if the ALJ's findings are based on legal error or not
9 supported by substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d
10 1211, 1214 n.1 (9th Cir. 2005) (*citing Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir.
11 1999)).
12

13 DISCUSSION

14 (1) Whether the ALJ properly evaluated the medical evidence.

15 Plaintiff contends the ALJ did not properly consider the medical evidence that
16 shows her restless leg syndrome and migraines to be severe impairments (Dkt. 10, p. 3-
17 8). According to the ALJ, plaintiff's restless leg syndrome was well controlled by
18 medication and her migraines were diagnosed but not referenced as limitations on
19 functioning (AR. 24). As a result, ALJ found plaintiff's restless leg syndrome and
20 migraines medically determinable but not severe impairments (AR. 23-25).
21

22 Step two of the administration's evaluation process requires the ALJ to determine
23 if the claimant "has a medically severe impairment or combination of impairments."
24

1 *Smolen v. Chater*, 80 F.3d 1273, 1289-90 (9th Cir. 1996) (citation omitted); 20 C.F.R. §§
2 404.1520(a)(4)(ii), 416.920(a)(4)(ii) (1996). An impairment is "not severe" if it does not
3 "significantly limit" the ability to conduct basic work activities. 20 C.F.R. §§
4 404.1521(a), 416.921(a). "An impairment or combination of impairments can be found
5 'not severe' only if the evidence establishes a slight abnormality that has 'no more than a
6 minimal effect on an individual[']s ability to work.'" *Smolen, supra*, 80 F.3d at 1290
7 (quoting Social Security Ruling "SSR" 85-28) (citing *Yuckert v. Bowen*, 841 F.2d 303,
8 306 (9th Cir. 1988)). The step-two analysis is "a *de minimis* screening device to dispose
9 of groundless claims," when the disability evaluation process ends at step two. *Smolen*,
10 *supra*, 80 F.3d at 1290 (citing *Bowen v. Yuckert*, 482 U.S. 137, 153-54 (1987)).

12 When an ALJ fails to find an impairment severe, the error is not necessarily
13 harmless just because the ALJ proceeds to subsequent steps in the sequential disability
14 evaluation process. *See Hill v. Astrue*, 698 F.3d 1153, 1161 (9th Cir. 2012). The Ninth
15 Circuit court concluded that an ALJ erred where the ALJ failed to find severe a
16 claimant's panic disorder when the claimant described symptoms consistent with panic
17 disorder to the ALJ at the administrative hearing. *See id.* The court found that because
18 "the ALJ excluded panic disorder from [the claimant's] list of impairments and instead
19 characterized her diagnoses as anxiety alone, the residual functional capacity
20 determination was incomplete, flawed, and not supported by substantial evidence in the
21 record." *See id.* This is precisely the type of error alleged by plaintiff in this case. She
22 contends the failure to find her restless leg syndrome and migraine to be severe
23 impairments affected the RFC assessment (Dkt. 17, p. 5).

1 According to plaintiff, the RFC did not fully account for all limitations related to
2 her restless leg syndrome, including her inability to sleep, rest, and concentration (Dkt.
3 17, p. 5). However, substantial evidence in the record supports the ALJ's finding that
4 restless leg syndrome was well controlled with medication (AR. 24). Plaintiff had
5 success with her medication for restless leg syndrome in February 2008 (AR. 286). She
6 appears to have experienced significant control through at least May 2011, when she
7 reported that her medication continued to work well and denied any breakthrough
8 symptoms (AR. 283). By February 2012, plaintiff was experiencing increased restless
9 leg symptoms and expressed difficulty getting to sleep and staying asleep (AR. 500).
10 She attended a neurology appointment and received a sample of new medication (AR.
11 500). In April 2012, an evaluating physician noted she had historically good control of
12 her restless leg syndrome, but recently experienced less control (AR. 419). Plaintiff's
13 therapist noted in August and September 2012 that restless leg symptoms were keeping
14 her awake and interfering with her mental state (AR. 533, 528). However, by October
15 2012 her symptoms had diminished and this continued at least through November 2012
16 (AR. 525, 523).

18 As the record demonstrates, plaintiff had significant control of the symptoms of
19 her restless leg syndrome for much of the alleged period of disability. She experienced
20 more symptomology in 2012, resulting in some interference with her mental state (AR.
21 533). However, the ALJ specifically noted that the RFC limitation to simple, routine,
22 repetitive tasks in a predictable environment stemmed from plaintiff's mental health
23 impairments and restless leg syndrome (AR. 25). The ALJ, despite finding restless leg
24

1 syndrome non-severe, took possible concentration issues into consideration by limiting
2 her to simple, routine, tasks.

3 Plaintiff's representative alleged the restless leg symptoms contributed to
4 concentration issues rather than physical limitations (AR. 25, 66). The ALJ accounted
5 for possible concentration limitations in the RFC (AR. 25). Plaintiff does not articulate
6 any additional limitations required by her restless leg syndrome. The Court declines to
7 find that the ALJ failed to account for plaintiff's restless leg syndrome in some
8 unspecified way. *See Valentine v. Comm'r of Soc. Sec. Admin.*, 574 F.3d 685, 692 n. 2
9 (9th Cir. 2009).

10
11 The Court applies this same reasoning to plaintiff's claim that the RFC does not
12 include limitations due to her migraines. Plaintiff alleges an incomplete RFC but fails to
13 identify any limitations necessary to account for her migraines. Additionally, plaintiff's
14 testimony is the only evidence of the symptoms, frequency and severity of her migraines
15 (AR. 62). Plaintiff's testimony, as discussed below, was properly found not credible and,
16 therefore, does not provide substantial evidence to support further restrictions in the RFC.
17 *See Britton v. Colvin*, 787 F.3d 1011, 1014 (9th Cir. 2015) (medical evidence based on
18 plaintiff's incredible testimony was not the substantial evidence necessary for including
19 migraines in the examination of the vocational expert).

20
21 Regardless of whether plaintiff's migraines and restless leg syndrome rise to the
22 level of severe impairments, plaintiff has shown no harmful error requiring reversal. *See*
23 *Stout v. Comm'r of Soc. Sec. Admin.*, 454 F.3d 1050, 1054-55 (9th Cir. 2006) (harmless
24 error applies in Social Security context when the mistake is non-prejudicial to the

1 claimant or irrelevant to the ultimate disability conclusion). The ALJ identified other
2 severe impairments to satisfy the de minimis requirements of step two of the disability
3 determination (AR. 23). In the RFC, the ALJ accounted for the impairment in
4 concentration resulting from restless leg syndrome by restricting plaintiff to simple,
5 routine tasks. Without credible evidence of additional limitations from restless leg
6 syndrome and migraines, plaintiff cannot establish the need for further restrictions in the
7 RFC. The ALJ's evaluation and incorporation of the medical evidence is affirmed.
8

9 (2) Whether the ALJ properly evaluated plaintiff's testimony.

10 Plaintiff testified that she has mood swings and difficulties with thinking and
11 indecision (AR. 59-60). She lacks interest and often did not feel well (AR. 61). She gets
12 distracted and has racing thoughts (AR. 61). She has a hard time with household chores,
13 like laundry and dishes (AR. 62). She is easily overwhelmed and "can't hardly do
14 anything" (AR. 64). In her March 2012 function report, plaintiff stated she rarely drove
15 or went outside (AR. 263). Instead, she spent most of the day watching television and
16 sleeping (AR. 264). She claimed to isolate and avoid contact with people (AR. 261).
17

18 The ALJ found plaintiff's testimony not completely credible (AR. 28). According
19 to the ALJ, plaintiff's testimony lacked credibility because it was not fully consistent
20 with the treatment record, clinical observations and mental status examinations, or
21 plaintiff's extensive activities. (AR. 33). Plaintiff contends these are not specific, clear,
22 and convincing reasons for discrediting her testimony (Dkt. 10, p. 14).
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24

1 If the medical evidence in the record is not conclusive, sole responsibility for
2 resolving conflicting testimony and questions of credibility lies with the ALJ. *Sample v.*
3 *Schweiker*, 694 F.2d 639, 642 (9th Cir. 1999) (citing *Waters v. Gardner*, 452 F.2d 855,
4 858 n.7 (9th Cir. 1971) (*Calhoun v. Bailar*, 626 F.2d 145, 150 (9th Cir. 1980)). The
5 ALJ's credibility determinations "must be supported by specific, cogent reasons."
6 *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir. 1998) (citing *Bunnell v. Sullivan*, 947 F.2d
7 341, 343, 346-47 (9th Cir. 1991) (*en banc*)). In evaluating a claimant's credibility, the
8 ALJ cannot rely on general findings, but "must specifically identify what testimony is
9 credible and what evidence undermines the claimant's complaints.'" *Greger v. Barnhart*,
10 464 F.3d 968, 972 (9th Cir. 2006) (quoting *Morgan v. Comm'r of Soc. Sec. Admin.*, 169
11 F.3d 595, 599 (9th Cir. 1999)); *Reddick, supra*, 157 F.3d at 722 (citations omitted);
12 *Smolen v. Chater*, 80 F.3d 1273, 1284 (9th Cir. 1996) (citation omitted).

14 Once a claimant produces medical evidence of an underlying impairment, the ALJ
15 may not discredit a claimant's testimony as to the severity of symptoms based solely on a
16 lack of objective medical evidence to corroborate fully the alleged severity of pain.
17 *Bunnell v. Sullivan*, 947 F.2d 341, 343, 346-47 (9th Cir. 1991) (*en banc*) (citing *Cotton*,
18 *supra*, 799 F.2d at 1407); Social Security Ruling ("SSR") 96-7p, 1996 WL 374186 at *2,
19 1996 SSR LEXIS 4 at *3 (this Ruling emphasizes that a claimant's "statements about the
20 intensity and persistence of pain or other symptoms or about the effect the symptoms
21 have on his or her ability to work may not be disregarded solely because they are not
22 substantiated by objective medical evidence"). If an ALJ rejects the testimony of a
23 claimant once an underlying impairment has been established, the ALJ must support the
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1 rejection “by offering specific, clear and convincing reasons for doing so.” *Smolen*,
2 *supra*, at 1284 (*citing Dodrill v. Shalala*, 12 F.3d 915, 918 (9th Cir.1993)); *see also*
3 *Reddick, supra*, 157 F.3d at 722 (*citing Bunnell v. Sullivan, supra*, 947 F.2d at 343, 346-
4 47). As with all of the findings by the ALJ, the specific, clear and convincing reasons
5 also must be supported by substantial evidence in the record as a whole. 42 U.S.C. §
6 405(g); *see also Bayliss v. Barnhart*, 427 F.3d 1211, 1214 n.1 (9th Cir. 2005) (*citing*
7 *Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir. 1999)).

8
9 Here, the ALJ found plaintiff’s allegations of disabling mental limitations were
10 inconsistent with the longitudinal record “which shows some waxing and waning of
11 mental health symptoms, but largely good functioning when on the right combination of
12 medications, exercise, and therapy” (AR. 28). Substantial evidence in the record supports
13 this finding. Plaintiff’s mental health treatment history shows general clinical stability,
14 except for a few periods of elevated symptoms and one episode of decompensation.

15 Plaintiff alleged disability beginning January 1, 2008 (AR. 72). In December 2007
16 she began seeing Kathryn Johansen, MN, ARNP (AR. 571). At her initial appointment
17 she presented with psychomotor slowing, blunted and labile affect (AR. 571). She was
18 distractible and had poor concentration and somewhat abnormal short- term memory
19 (AR. 571). Ms. Johansen began adjusting her psychiatric medications (AR. 567). During
20 a July 2008 appointment, plaintiff reported feeling a little better (AR. 339). Her memory
21 was “not good” but she was riding a bicycle for exercise (AR. 339). By November 2008
22 plaintiff was doing well and felt her medication was working (AR. 337). She had more
23 energy and motivation and her memory was improved (AR. 337). She was able to read
24

1 and was thinking about volunteering (AR. 337). This stability continued in January 2009
2 when she felt a little better and could joke around a bit more (AR. 337). In February
3 2009, plaintiff continued to feel better and planned to return to volunteering with the
4 school district (AR. 336). She was clinically stable with improved concentration in April
5 2009 (AR. 335). Improvement continued through July 2009, when she had a bright affect
6 and reported more energy and interest (AR. 334). She went to Hawaii for vacation (AR.
7 334). She was sleeping well and walking two to three times per week (AR. 334).

8
9 Plaintiff experienced an exacerbation of her symptoms in October 2009 (AR. 333).
10 She reported to Ms. Johansen that her job for the school district had ended and she was
11 bored and “going stir crazy” (AR. 333). She had some decompensation but her reading
12 and concentration remained good (AR. 333). These symptoms stabilized quickly, and by
13 November 2009 plaintiff was feeling the positive benefits of light therapy and exercise
14 (AR. 332). She told Ms. Johansen that she was walking three times per week and
15 attending yoga twice per week (AR. 332). Despite a stressful holiday season, plaintiff’s
16 mood was pretty good and she was stable in January 2010 (AR. 331). But, on April 13,
17 2010, plaintiff reported she had experienced an up and down period (AR. 330). Although
18 Ms. Johansen considered her clinically stable, her memory was poor and she was a little
19 delayed (AR. 330). At that time plaintiff informed Ms. Johansen that she was returning
20 to work for thirty hours per week (AR. 330). In June 2010 plaintiff “had a bit of a
21 breakdown” due to family issues (AR. 327). She had decompensated but Ms. Johansen
22 still considered her clinically stable (AR. 327).
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1 By October 2010, plaintiff was feeling much better, doing yoga and walking, and
2 had lost weight (AR. 325). In December 2010, plaintiff was clinically stable and
3 continued yoga two days per week and walking three days per week (AR. 324).
4 However, she was a little more depressed and dealing with family issues (AR. 324). Her
5 symptoms continued to increase through February 2011 with more depression, slower
6 thinking, and poor memory (AR. 323). A change in medication yielded improvement by
7 March, when plaintiff was feeling better, thinking more quickly, attending yoga,
8 volunteering, and sleeping very well (AR. 322). This stability continued through May,
9 when plaintiff had more energy and bright affect (AR. 321). She was quicker to smile and
10 less delayed but reported an increase in racing thoughts (AR. 321).
11

12 During an appointment with Ms. Johansen on August 4, 2011, plaintiff showed
13 signs of a hypomanic episode (AR. 320). Ms. Johansen made several medication changes
14 to address the symptoms (AR. 317-320). With changes to her medication, plaintiff was
15 improved and clinically stable by late September 2011 (AR. 314). She continued to be
16 clinically stable, but with little energy and increased depression through March 2012
17 (AR. 422-23). Ms. Johansen made more adjustments in medication and in July 2012
18 plaintiff reported being more active and alert (AR. 560). She was working on stained
19 glass and had gone through old pictures (AR. 560).
20

21 In August 2012, plaintiff experienced significant decompensation (AR. 554-56).
22 Ms. Johansen suspected plaintiff had not been taking her medication (AR. 554). Plaintiff
23 showed mania and possible psychosis. Hospitalization was recommended but refused
24 (AR. 555). The police were dispatched to plaintiff's home for a welfare check (AR. 555).

1 | Soon after, plaintiff's husband left her and she terminated her therapeutic relationship
2 | with Ms. Johansen (AR. 553, 528).

3 | The crisis was resolved and plaintiff began improving in September 2012 (AR.
4 | 528). She was seeing a new therapist, Barry Anton, Ph.D., and responding to medication
5 | (AR. 528). She was upset her husband had left her (AR. 528). Her speech was pressured,
6 | she had trouble tracking at times, and lost her train of thought (AR. 528). However, Dr.
7 | Anton noted that her memory was intact and her attention and concentration were fair
8 | (AR. 528). Plaintiff was significantly improved in October 2012. She reported
9 | volunteering for activities and attending a divorce group (AR. 524-25). She took walks
10 | and had dinner with a friend (AR. 524-25). She remained sad that her husband had left,
11 | but she showed good memory, attention, and concentration (AR. 524-25). She presented
12 | similarly at appointments with Dr. Anton through November 2012 (AR. 523).

14 | This mental health history, and more, was described at length by the ALJ (AR. 28-
15 | 32). Plaintiff contends the ALJ engaged in selective analysis of the medical evidence by
16 | failing to discuss the clinical findings supporting her allegations of disabling mental
17 | impairments (Dkt. 17, p. 7). But, the written decision belies this claim. The ALJ gave a
18 | thorough review of the medical record. The ALJ's examination of the record included the
19 | times of increased symptomology (AR. 28-31). In particular, the ALJ noted increased
20 | symptoms in October 2009, April 2010, December 2010, December 2011, January 2012,
21 | and March 2102, culminating in severe decompensation in August 2012 (AR. 28-31).
22 | The August 2012 period of decompensation was under control by September 2012 and
23 | likely stemmed from plaintiff's failure to take her medication (AR. 31-32, 528). The ALJ
24 |

1 acknowledged and discussed these periods of greater impairment, but still found the
2 record supportive of overall clinical stability. As shown above and by the ALJ, this
3 finding is supported by substantial evidence. The ALJ correctly determined that the
4 objective medical evidence is not consistent with plaintiff's allegations of disabling
5 mental impairments.

6 As plaintiff points out, the ALJ cannot rely on a lack of objective medical
7 evidence alone to reject her testimony. *See Bunnell v. Sullivan, supra*, 947 F.2d at 343,
8 346-47 (9th Cir. 1991) (*en banc*) (citing *Cotton, supra*, 799 F.2d at 1407). However, the
9 ALJ also found plaintiff's activities inconsistent with her allegations of disability and
10 "reflect the need for no greater restrictions than those set forth in the residual functional
11 capacity" (AR. 33). The Ninth Circuit specified "the two grounds for using daily
12 activities to form the basis of an adverse credibility determination: (1) whether or not
13 they contradict the claimant's other testimony and (2) whether or not the activities of
14 daily living meet "the threshold for transferable work skills." *Orn, supra*, 495 F.3d at 639
15 (citing *Fair, supra*, 885 F.2d at 603). Here, the ALJ found plaintiff's extensive activities
16 inconsistent with her claims of disabling mental impairments (AR. 34-35).

17
18 Plaintiff reported she rarely left the house and did little other than watch television
19 and sleep (AR. 264). However the record shows significant activity outside the house.
20 As Dr. Anton noted, she was "sad and withdrawn but not inactive" (AR. 523). The ALJ
21 gave several examples of plaintiff's many activities, including her capacity to work part-
22 time for much of the period at issue, volunteer, attend to her own personal care and light
23 house cleaning, go to yoga classes, walk by herself or with neighbors, go to several
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1 support groups, and take a stained-glass class (AR. 33-34). The record supports
2 plaintiff's participation in all of these activities. Plaintiff often described attending yoga
3 twice a week and walking three times a week (AR 322, 324, 325, 332). She was working
4 part time as late as January 2012 (AR. 423). She volunteered in various capacities. In
5 October 2012 she assisted first graders (AR. 552). In November 2012, she inventoried
6 items for her church (AR. 523). She also testified that she volunteered an hour at the
7 schools and an hour at a school museum (AR. 51).

8
9 While these activities are not necessarily transferable to a work setting, they do
10 conflict with plaintiff's claims of spending much of her day lying down and her inability
11 to function due to problems with comprehension, concentration, feeling overwhelmed
12 and mood swing (AR. 53, 264). In listing these various activities, the ALJ gave specific,
13 clear and convincing evidence in support of the finding that plaintiff is not as limited as
14 she claims. The ALJ's credibility determination is affirmed.

15
16 (3) Whether the ALJ properly evaluated the lay evidence.

17 Pursuant to the relevant federal regulations, there are "other sources," such as
18 friends and family members, who are defined as "other non-medical sources." *See* 20
19 C.F.R. § 404.1513 (d). An ALJ may disregard opinion evidence provided by "other
20 sources," characterized by the Ninth Circuit as lay testimony, "if the ALJ 'gives reasons
21 germane to each witness for doing so.'" *Turner, supra*, 613 F.3d at 1224 (*quoting Lewis v.*
22 *Apfel*, 236 F.3d 503, 511 (9th Cir. 2001)); *see also Nguyen v. Chater*, 100 F.3d 1462,
23 1467 (9th Cir. 1996). This is because in determining whether or not "a claimant is
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1 disabled, an ALJ must consider lay witness testimony concerning a claimant's ability to
2 work.” *Stout v. Commissioner, Social Security Administration*, 454 F.3d 1050, 1053 (9th
3 Cir. 2006) (*citing Dodrill v. Shalala*, 12 F.3d 915, 919 (9th Cir. 1993); 20 C.F.R. §§
4 404.1513(d)(4) and (e), 416.913(d)(4) and (e)).

5 Plaintiff’s husband, Tom Loewen, submitted a report about her functioning in
6 October 2011 (AR. 225-32). According to Mr. Loewen, plaintiff she was excessively
7 tired and unable to concentrate or make simple decisions (AR. 225). She did not perform
8 any household chores (AR. 227). But, she did go to yoga and have game night at home
9 with friends (AR. 229). Mr. Loewen also stated plaintiff had “heavy mood swings”
10 making interactions difficult (AR. 230).

12 The ALJ evaluated this function report of excessive tiredness, poor concentration,
13 inability to make decisions, and difficulty getting along with others and was “not
14 convinced that the claimant’s functioning is more restricted than described in the residual
15 functional capacity” (AR. 37). In support of this finding, the ALJ noted that plaintiff’s
16 periodic reports of fatigue and low energy did not significantly impact her functioning.
17 Plaintiff could work, volunteer, go to yoga, and attend support groups (AR. 37). As
18 noted above, plaintiff was able to engage in all of these activities. Therefore, plaintiff’s
19 own reported activities contradict the lay evidence. This conflict is a germane reason to
20 reject Mr. Loewen’s statement. *See Bayliss v. Barnhart, supra*, 427 F.3d at 1218 (ALJ
21 properly rejected the testimony of friends and family that was inconsistent with the
22 record of plaintiff’s activities and objective evidence in the record).
23
24

1 Plaintiff also contends the ALJ failed to discuss two email messages sent from Mr.
2 Loewen to Ms. Johansen in July and August 2012 describing plaintiff's decompensation
3 (Dkt. 10, p. 16). This information is largely duplicative of the medical records properly
4 evaluated and summarized by the ALJ (AR. 31-32). Furthermore, the ALJ discussed and
5 considered plaintiff's August 2012 decompensation. Any failure to explicitly discuss Mr.
6 Loewen's emails was inconsequential to the ultimate disability determination, and
7 therefore, harmless. *See Stout, supra*, 454 F.3d at 1054-55.
8

- 9 (4) Whether the ALJ properly assessed plaintiff's residual functional capacity
10 and based the step five finding on a residual functional capacity assessment
that did not include all of plaintiff's limitations.

11 Plaintiff asserts that the ALJ did not correctly formulate her RFC and, therefore,
12 based the step five finding on an incomplete RFC. This is merely a restatement of the
13 previously addressed arguments concerning the properly discounted evidence. As a
14 result, no error is established. *See Stubbs-Danielson v. Astrue*, 539 F.3d 1169, 1175-6
15 (9th Cir. 2008).
16

- 17 (5) Whether or not the new evidence that was submitted to the Appeals Council
18 supports remand for a new hearing.

19 Plaintiff submitted a letter from her psychologist, Dr. Barry Anton, Ph.D., to the
20 Appeals Council (AR. 576-77). The Appeals Council denied review but incorporated the
21 evidence into the administrative record (AR. 1-5). "[W]hen a claimant submits evidence
22 for the first time to the Appeals Council, which considers that evidence in denying review
23 of the ALJ's decision, the new evidence is part of the administrative record, which the
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1 district court *must* consider in determining whether [or not] the Commissioner’s decision
2 is supported by substantial evidence.” *Brewes v. Comm’r of SSA*, 682 F.3d 1157, 1159-60
3 (9th Cir. 2012) (emphasis added).

4 Dr. Anton’s letter summarized plaintiff’s treatment in his care from June 18, 2012
5 through the date of the letter, May 9, 2013. (AR. 576-77). In addition to her treatment
6 history, Dr. Anton noted plaintiff lacked motivation due to her depression (AR. 577). He
7 observed flattened or sad affect, as well as poor memory and concentration at her
8 appointments (AR. 577). He sees her every three to four weeks and she continues to
9 attend two support groups (AR. 577). He stated plaintiff stopped volunteering teaching
10 second graders (AR. 577). He concluded, “[s]he is conflicted about working, feeling that
11 she is not capable of doing so at this time” (AR. 577).
12

13 Plaintiff contends the letter from Dr. Anton “shows that there is a reasonable
14 possibility that the ALJ’s determination would have been different had she considered
15 this evidence” (Dkt. 10, p. 19). However, the letter merely summarizes plaintiff’s mental
16 health history and makes a few general comments about her symptoms as of May 2013
17 (AR. 577). While Dr. Anton noted plaintiff’s feelings about returning to work, he failed
18 to give a medically supported opinion as to whether plaintiff was capable of working.
19 The letter provides little additional information and does not undermine the ALJ’s
20 decision. Remand for consideration of this new evidence is unnecessary.
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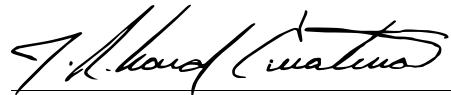
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CONCLUSION

Based on these reasons and the relevant record, the Court **ORDERS** that this matter be **AFFIRMED**.

JUDGMENT for defendant and the case should be closed.

Dated this 4th day of January, 2016.

A handwritten signature in black ink, appearing to read "J. Richard Creatura", written over a horizontal line.

J. Richard Creatura
United States Magistrate Judge